No. 75-676

In the Supreme Court of the United States

OCTOBER TERM, 1975

BOWMAN TRANSPORTATION, INC., APPELLANT

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This memorandum is submitted in response to this Court's order of January 12, 1976, inviting the Solicitor General to express the views of the United States.

STATEMENT

Bowman Transportation Company appeals from the judgment of the three-judge district court modifying an order of the Interstate Commerce Commission (the "Commission") granting it certain motor common carrier operating authority. That modification would preclude appellant from "tacking" or combining authority granted by the instant certificate of public convenience and necessity with certain other authority it already possessed, and thus preclude it from providing through transportation service between the geographic areas covered by the new certificate and those points it presently serves. The United States and the Commission were defendants in the district court but have not appealed from its adverse decision.

The same three-judge court previously had set aside the Commission's order granting additional route authority to appellant and two other carriers. This Court reversed that decision in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281. As to the other two carriers, this Court held that the Commission's grant of authority was valid and should be sustained. As to appellant, however, this Court noted that an issue not previously considered by the district court remained unresolved, and it therefore remanded the case for consideration of the lawfulness of the Commission's grant of so-called "excess" authority to appellant.[1]

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[1]In remanding the case to the district court, this Court stated (419 U.S. at 299-300):

> As to appellant Bowman, however, an issue remains. In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The "excess" was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority. Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the Court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications.
>
> While we have on occasion decided residual issues in the interest of an expeditious conclusion of protracted litigation, see *Consolo* v. *FMC*, 383 U.S. 607, 621 (1966), we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand.

The Court added, however, that the remand order "provides no basis for depriving [appellant] of authority conferred by the Commission that was within its original application." *Id.* at 300.

On remand, the original plaintiffs argued that the Commission had granted Bowman excess authority in two ways: by authorizing it to serve Montgomery, Alabama, and to use that city as a gateway, subject to publication of its intention in the Federal Register in order to remedy the defective notice in appellant's original application; and by failing to prohibit appellant from tacking the authority granted in this proceeding with certain operating authority it had purchased from Alabama Highway Express after the filing of the instant application (Docket No. MC-F-9921). The United States, the Commission and appellant contended that the propriety of the tacking restriction was not included within the scope of this Court's remand order. But the district court held that it was authorized to consider the tacking question in the remand proceedings (J.S. App. 31-33).

The court concluded that the Commission had properly granted appellant the authority to serve Montgomery, since a public need had been shown for this service and the defective notice had been cured by subsequent publication in the Federal Register (J.S. App. 31). However, it determined that the Commission had improperly failed to include a restriction against appellant's tacking the subject authority with the authority previously purchased from Alabama Highway Express, on the ground that a public need for combining these two services had not been demonstrated (J.S. App. 36-37). The court interpreted appellant's application as containing a self-imposed limitation that it would not tack the sought after authority with any other authority acquired after its filing (J.S. App. 36). See also *Arkansas-Best Freight System, Inc.* v. *United States*, 364 F. Supp. 1239, 1255 (W.D. Ark.), reversed on other grounds, 419 U.S. 281. The court therefore held that the Commission's failure to impose a tacking restriction constituted an otherwise unjustified

grant of authority in excess of that sought in the application and directed the Commission to modify appellant's certificate of public convenience and necessity to include such a restriction (J.S. App. 44).

ARGUMENT

Appellant's jurisdictional statement presents two questions: Whether the district court's consideration of the tacking issue exceeded the scope of this Court's remand order; and, if the tacking issue was properly considered by the court below, whether that court erred in overturning this aspect of the Commission's decision. While we have serious doubts about the correctness of the district court's decision, we do not believe that either issue is of sufficient importance to warrant plenary consideration by this Court. We suggest that summary disposition is appropriate.

1. This Court itself is in the best position to determine whether it intended the district court to consider any issue on remand other than the propriety of the Commission's grant of authority to serve Montgomery, Alabama, subject to republication in the Federal Register. Resolution of this issue would not be advanced by the filing of additional briefs or oral argument. If this Court intended that the district court's inquiry on remand be limited to this particular question, then its decision should be summarily reversed, with directions to sustain the Commission's decision. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154; *United States* v. *Dixie Highway Express*, 389 U.S. 409.

2. If this Court intended that the lower court not be precluded from considering the tacking issue, the only remaining question is whether the district court properly held that the Commission was obligated to impose a restriction against appellant's tacking the authority

granted in this proceeding with the authority it purchased from Alabama Highway Express. Appellant's original application stated that it intended to tack the authority described in that application "with that authority previously granted" (J.S. App. 32). The district court construed this phrase as containing a self-imposed restriction that appellant would not tack the requested authority with any authority acquired after the *filing* of the application (J.S. App. 36).[2] Under this interpretation, the district court concluded that "[p]laintiffs and any other interested parties were entitled to rely on the representations contained in the application" (J.S. App. 37). It therefore held that insofar as the Commission's order authorized a tacking of this authority with the authority acquired after the filing, but prior to the grant, of this application, it authorized an operation not covered by the application and must be set aside.

We believe that the district court's reading of appellant's application is unduly restrictive. Properly interpreted, the application states appellant's intention to tack the instant authority with all authority that might be granted to it prior to a final ruling on this application. Subsequent publication of notice of its intention to purchase the operating rights of Alabama Highway Express warned competing carriers of appellant's intention to combine that authority with the rest of its route structure.[3]

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[2]The Commission recently has adopted new rules governing the right of irregular-route carriers to tack their separately granted authorities. See *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed by this Court, No. 75-414, January 12, 1976. However, that change of policy does not affect the right of carriers to combine authority under the regular-route certificates involved in this litigation.

[3]After the acquisition, all pleadings filed in this proceeding expressly stated that intention (Pet. 13).

The competitor's objections therefore should have been raised in the proceeding in which appellant purchased that authority.

We do not believe, however, that plenary review is warranted in order to determine the correctness of the district court's interpretation of the meaning of one phrase in a particular route authorization application. Moreover, the district court's decision does not irrevocably deprive appellant of the opportunity to obtain the right to tack the authorities in question. If it elects to do so, appellant may file an application for that authority under Section 207 of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307, and, if appropriate, an application for temporary authority under Section 210a (a), 52 Stat. 1238, as amended, 49 U.S.C. 310a(a).

Therefore, as to this issue as well, we suggest that plenary consideration would be inappropriate and that summary disposition would be proper.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ARTHUR J. CERRA,
General Counsel,
Interstate Commerce Commission.

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